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In the Supreme Court of the United States

OCTOBER TERM, 1963

No. 421

UNITED STATES OF AMERICA AND INTERSTATE COMMERCE COMMISSION, APPELLANTS

v.

EMMA SHANNON & RICHARD J. SHANNON, D/B/A E. AND R. SHANNON, ETC.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF TEXAS—SAN ANTONIO DIVISION

BRIEF FOR THE APPELLANTS

OPINIONS BELOW

The opinion of the district court (R. 163–167) is reported at 219 F. Supp. 781. The report of the Interstate Commerce Commission (R. 17–31) is reported at 81 M.C.C. 337.

JURISDICTION

The judgment of the district court was entered on May 1, 1963 (R. 168). The United States and the Interstate Commerce Commission filed their notice of appeal on July 1, 1963 (R. 175). This Court noted probable jurisdiction on November 12, 1963 (375 U.S. 901; R. 178). The jurisdiction of this Court is conferred by 28 U.S.C. 1253 and 2101(b).

STATUTES INVOLVED

The pertinent provisions of Part II of the Interstate Commerce Act, 49 U.S.C. 301, *et seq.*, are set forth in the Appendix, *infra*, pp. 35–57.

QUESTION PRESENTED

Whether the district court applied an erroneous standard in determining, under Section 203(c) of the Interstate Commerce Act, that appellees' motor transportation of sugar was "within the scope, and in furtherance, of a primary business enterprise (other than transportation)" and thus was exempt private carriage, rather than for-hire transportation requiring authority from the Commission.

STATEMENT

This case grows out of a proceeding instituted by the Interstate Commerce Commission to determine whether the appellees' motor transportation of sugar constituted carriage for-hire rather than private carriage, and therefore was illegal because performed without operating authority from the Commission.

1. The partnership of E. & R. Shannon, with headquarters in San Antonio, Texas, has been engaged in the business of buying and selling livestock since 1934. About 1951, its activities were expanded to include the purchase and resale of fertilizer, feed grain, molasses and similar items in the feed line; and, since 1954, appellees have also engaged in sugar dealing (R. 23, 106–107). Appellees operate seven trucks which they use for the transportation of these goods. On shipments of livestock, feed grains and related items—but not sugar—appellees also use com-

mon carriage to some extent (R. 23, 115–116). It is conceded that, in transporting the items other than sugar, the appellees are acting in furtherance and within the scope of their primary commercial enterprise and are engaged in lawful private carriage (R. 23).

The appellees' dealings in sugar were developed in order to provide return cargo for their trucks which make deliveries of livestock or other merchandise at or near the site of a sugar refinery at Supreme, Louisiana, located about 525 miles from San Antonio (R. 29, 112–113, 132). Three of their trucks were so used (R. 97–98). The sugar is bought when one of their trucks which has made a delivery near Supreme would otherwise return empty to San Antonio (R. 23–25, 29). Usually, the sugar is sold by the appellees while it is in transit from the refinery and within a day or two of the date on which it is picked up (R. 24, 29, 68, 117–118). Most of the sugar is handled in truckload lots and is sold and delivered directly to ultimate consumers, principally wholesale grocers, candy companies, bottlers and dairies in the San Antonio area (R. 66–67, 70, 83; Ex. 1, R. 118),[1] without processing or warehousing by the appellees (R. 23–24, 68). At no time have the appellees bought or sold sugar which they have not transported in their own trucks (R. 115). A small quantity of sugar is generally on hand and sold from the warehouse in lots of from 1 to 25 bags (R. 23, 69, 80–81). This, in many instances, results from the failure of an expected purchaser of a truckload to buy (R. 108, 110–111). The appellees maintain their ware-

[1] Ex. 1 was received in evidence at R. 62.

house primarily for the processing or storage of grains, feeds or fertilizers (R. 75, 87–88, 166).

Appellees' gross average return from handling sugar between San Antonio and Supreme is about 35 cents per hundred pounds over the cost of sugar at the refinery, a return which must also cover transportation (R. 24; Ex. 1, 117–118). The average profit of sugar dealers at San Antonio was 25 to 35 cents per hundred pounds *after* transportation costs; and the common carrier rates for the transportation of sugar from Supreme to San Antonio (about 525 miles) are 69 cents per hundred pounds on rail carload shipments and $1.09 per hundredweight in truckload shipments (R.24, 78; Exs. 2 and 3, R. 119–126).[1] Beet sugar from Colorado and California and occasionally from Canada is offered in the San Antonio area at prices competitive with those at which appellees sell Louisiana sugar (R. 108).

At the prevailing price of sugar in the San Antonio area, the appellees could not dispatch empty vehicles to the refinery for loads of sugar and maintain a profit margin. Appellees concede that their sugar operations are profitable only because of the backhaul availability of their trucks which have completed deliveries of other commodities at or near Supreme and which otherwise would be returned empty to San Antonio (R. 24–25, 29, 112). Occasionally, the appellees do send their trucks empty to Supreme to satisfy special prior orders of sugar, but only "where we get a lot more money" (R. 112). They acknowledge that

[1] Exs. 2 and 3 were received in evidence at R. 63 and 64, respectively.

normally they could not so operate profitably, and that, in their handling of sugar, they are "backhauling to make money * * * backhauling to make a profit" (R. 29, 112–113).

2. The Commission held that the appellees' transportation of sugar, unlike their transportation of livestock, feeds and fertilizers and related items, was not within the scope and in furtherance of a non-transportation business and hence was not lawful private carriage. It ordered appellees to cease and desist from continuing their transportation of sugar in the manner described, unless and until they obtained the requisite operating authority from the Commission (R. 25, 30).[2]

The Commission pointed out that, under Section 203(c) of the Interstate Commerce Act, the basic criterion for determining the status of one whose primary business is not transportation is whether the disputed operations are "in bona fide furtherance of the primary business" or whether they "are conducted as related or secondary enterprises with the purpose of profiting from the transportation performed" (R. 26). Noting that "the Shannons admit that their principal reason for purchasing sugar at Supreme is to provide a backhaul in connection with outbound movements of livestock and other commodities from San Antonio, and that in order to make a profit on

[2] The Commission's order was entered by Division 1 of the Commission. The full Commission denied a petition for reconsideration on April 5, 1960 (R. 38). The report and orders in this case were consolidated with those in Docket No. MC–C–1994, *Fraering Brokerage Co. Inc., Investigation of Operations.*

the backhaul of sugar they would have to have something moving to Louisiana from San Antonio" (R. 29), the Commission said (R. 29–30):

> We are satisfied that the purpose of their buying and selling sugar and the transportation thereof from Supreme to certain points in Texas is to reduce the cost of transporting other commodities outbound from San Antonio. Such reduction of the cost of transportation of the other commodities constitutes a profit from the transportation of sugar from Supreme to the Texas points, and we are convinced that the sugar transportation engaged in by the Shannons is undertaken for the purpose of profiting from the transportation as such * * *. Transportation of the considered sugar by the Shannons is, with respect to their primary business of buying and selling livestock and certain other commodities, a related or secondary enterprise conducted with the purpose of profiting from the transportation performed, and, as such, constitutes for-hire carriage for which operating authority from this Commission is required * * *.

3. On appellees' complaint, the three-judge district court enjoined the Commission from enforcing its order. The court held that there was no substantial evidentiary support for the Commission's ultimate finding that the appellees were engaged in the for-hire transportation of sugar (R. 167). It concluded, rather, that appellees were engaged in a "general mercantile business buying and selling many items, including sugar" (R. 167).

The district court, in its summation of the evidence (R. 166–167), noted that sugar was only one of a number of commodities which the appellees bought and sold; that normally they purchased sugar without having received orders therefor; that a relatively small portion of the appellees' assets and weekly payroll were devoted to their transportation activities; that the appellees took title to the sugar and incurred the incidental risks of loss or damage in transit or of price fluctuations; that they sold the sugar on credit and had sizeable accounts receivable outstanding; that they maintained a "reasonable" inventory of sugar; that they assessed no identifiable transportation charge; and that they did not hold themselves out to the general public to haul sugar for compensation.

The court did not refer to Section 203(c) of the Act. Nor did it note that appellees normally transported sugar only to fill an empty truck on a backhaul; that they could not otherwise have bought and sold sugar profitably; or the other circumstances upon which the Commission based its determination that appellees' backhaul transportation of sugar was not within the scope and in furtherance of a primary business enterprise other than transportation.

SUMMARY OF ARGUMENT

The basic question in this case is whether appellees are in the *merchandising* business or the *transportation* business in their handling of sugar. If the former characterization is accurate, then the hauling of sugar in their own trucks, incidental to their dealings in the commodity, is lawful private carriage. Otherwise,

the transportation, conducted without authority from the Commission, is prohibited by the Interstate Commerce Act.

The underlying facts are not disputed. Accordingly, resolution of the issue depends on a proper construction and application of the relevant statutory provision, Section 203(c) of the Act.

A. We begin by tracing the history of the 1958 amendment to Section 203(c), which now explicitly bars all private carriage of goods for business purposes "unless such transportation is within the scope, and in furtherance, of a primary business enterprise (other than transportation)" of the carrier. We show that, from an early date, the Commission has been concerned with attempts to abuse the statutory exemption in favor of private carriage, and that, recently, one of the devices which the Commission has sought to control is the arrangement under which a business enterprise, faced with an empty "backhaul," buys and transports, for immediate resale, a commodity which is unrelated to a primary non-transportation activity. Turning to the immediate legislative history of the 1958 amendment, we demonstrate that Congress expressly adopted the administrative view that such unlicensed operations should not be condoned under the cover of lawful "private carriage."

B. Next, we examine the facts of record to determine whether appellees' sugar hauling operations meet the statutory standard for incidental private carriage. At the outset, we note that the dealings in sugar are discrete from appellees' other business activities in livestock and feed grain. Most signifi-

cantly, we note that sugar is transported only in the firm's own trucks, almost invariably on what would otherwise be an empty backhaul; that the profit on the transaction is insufficient to bear the cost of dispatching empty trucks for the commodity; and that the firm maintains no substantial inventory of sugar, usually arranging a sale within a day or two of receipt and deliverying the truckload directly to the buyer. On these facts, we conclude that appellees' sugar dealings amount to a transportation service, undertaken to mitigate the expense of hauling other goods, and are not a part of the firm's merchandising activities.

C. Finally, we examine the ruling below. Noting that the court failed even to cite the only applicable provision of the Interstate Commerce Act, Section 203(c), we show that its error lay in ignoring the facts relevant under the statutory standard.

ARGUMENT

APPELLEES' TRANSPORTATION OF SUGAR WAS NOT LAWFUL PRIVATE CARRIAGE UNDER SECTION 203(c) OF THE INTERSTATE COMMERCE ACT AND, THEREFORE, COULD NOT BE CONDUCTED WITHOUT AUTHORITY FROM THE COMMISSION

One of the continuing problems in administration of the Motor Carrier Act of 1935 has been that of defining the scope of private carriage, which is exempt from economic regulation under the Act and may be undertaken without Commission authority.[4] The

[4] Private carriage is subject only to safety regulation. Section 204(a)(3), 49 U.S.C. 304(a)(3). *United States* v. *American Trucking Ass'ns*, 310 U.S. 534, 550.

Commission "has had to decide whether a particular arrangement gives rise to that 'for-hire' carriage which is subject to economic regulation in the public interest, or whether it is, in fact, private carriage as to which Congress determined that the shipper's interest in carrying his own goods should prevail". *United States* v. *Drum*, 368 U.S. 370, 374 (1962). For a variety of reasons, many businesses prefer to transport their own goods in their own trucks, and the Act does not interfere with that practice. But, quite naturally, the existence of this area free of the regulatory controls applicable to for-hire carriage creates a strong incentive for others to render commercial transportation services under the guise of exempt private carriage. It has been attempted by such techniques as the sham leasing of vehicles (involved in *Drum*) and "buy-sell" transactions arranged so that the carrier owns the goods during transit, although in effect he is rendering transportation services. This case involves a special type of buy-sell arrangement, made to obtain a backhaul, i.e., to fill trucks which would otherwise return empty after a lawful outbound trip.[5] The danger is that this diversion of commercial carriage from the regulated motor carriers may impair their capacity to provide efficient service

[5] Buy-sell operations are described in a study by the Commission's Bureau of Transport Economics and Statistics, *Gray Area of Transportation Operations* (June 1960), p. 7. The backhaul buy-sell transactions specifically here at issue are described *id.* at pp. 11–12. See also O'Brien, *Twenty-Five Years of Federal Motor Carrier Licensing—The Private Versus For-Hire Carrier Problem*, 35 N.Y.U. L. Rev. 1150, 1156.

at reasonable rates to the bulk of shippers using, and dependent upon, regulated for-hire transportation.

Congress and the Commission have sought to meet this problem of distinguishing lawful private carriage by the development and articulation of the "primary business" test, now set forth in Section 203(c) of the Act. We shall discuss the meaning and purpose of the statutory criterion as applied to backhaul buy-sell arrangements (Point A); demonstrate that the Commission correctly applied it in this case (Point B); and argue that the district court misconceived the statutory test and erred in reversing the Commission (Point C).

A. THE 1938 AMENDMENT TO THE ACT WAS DESIGNED TO MAKE CLEAR THAT THE EXEMPTION OF PRIVATE CARRIAGE FROM REGULATION DID NOT COVER TRANSPORTATION OF GOODS BOUGHT BY A TRUCK OPERATOR FOR RESALE, WHERE THE VOLUME OF GOODS TRANSPORTED AND THE METHOD OF SALE AND DELIVERY ARE DETERMINED BY THE AVAILABLE BACKHAUL CAPACITY

The original Motor Carrier Act defined a "private carrier of property by motor vehicle" as a person, not a "common" or "contract" carrier,[6] who transports property of which he "is the owner, lessee or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise." Section 203(a)(17), 49 U.S.C. 303(a)(17), App., *infra*, p. 36. The Commission early took note of the inadequacy of this definition in that the exemption afforded private carriage might be abused through buy-sell arrangements. In

[6] The terms "common carrier by motor vehicle" and "contract carrier by motor vehicle" are defined in Section 203(a) (14) and (15), respectively, App., *infra*, p. 35.

numerous cases it warned that the truck operator's ownership of the goods being transported "alone is not sufficient to make this transportation that of a 'private carrier * * *'." *McBroom Contract Carrier Application*, 1 M.C.C. 425, 427 (1937).[7] In *McBroom*, the Commission granted a certificate authorizing the contract carriage of cheese, but, with respect to the carrier's practice of transporting on the return trip goods which it had purchased for resale at the end of the journey, the Commission noted that "the evidence available strongly suggests that this back-haul transportation is in reality for compensation as a common carrier" (*id.* at 427). From this beginning,[8] the commission gradually developed, as the controlling standard in this area, the so-called "primary business" test.

The leading decision of the entire Commission enunciating this test is *Lenoir Chair Co: Contract Carrier Application*, 51 M.C.C. 65 (1949), affirmed *sub nom. Brooks Transportation Co.* v. *United States*, 93 F. Supp. 517, 522 (E.D. Va., 1950), affirmed, 340 U.S. 925. Two chair manufacturers transported their prod-

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[7] See also *Carpenter Common Carrier Application*, 2 M.C.C. 85, 86 (1937); *D. L. Wartena, Inc., Common Carrier Application*, 4 M.C.C. 619, 623 (1938); *Johnson Common Carrier Application*, 10 M.C.C. 4, 5 (1938), and cases cited *infra*, p. 15, fn. 12.

[8] It soon became clear that the question could not be resolved simply by looking to the compensation paid the carrier. See *Woitishek Common Carrier Application*, 42 M.C.C. 193, 204–206 (1943); *Lenoir Chair Co. Contract Carrier Application*, 51 M.C.C. 65, 73–75, affirmed *sub. nom. Brooks Transportation Co.* v. *United States*, 93 F. Supp. 517, 522 (E.D. Va.), affirmed, 340 U.S. 925.

ucts in their own trucks; whenever possible, they also used the vehicles on the return movement to haul manufacturing materials for use and processing in their own plants. The Commission concluded (51 M.C.C. at 76) that the delivery of goods, and the backhaul, were lawful private carriage because undertaken "as a bona fide incident to and in furtherance of their primary businesses". And the governing rule was stated as follows (*id.* at 75):

> If the facts establish that the primary business of an operator is the supplying of transportation for compensation, then the carrier's status is established though the operator may be the owner, at the time, of the goods transported and may be transporting them for the purpose of sale * * *. If, on the other hand, the primary business of an operator is found to be manufacturing or some other noncarrier commercial enterprise, then it must be determined whether the motor operations are in bona fide furtherance of the primary business or whether they are conducted as a related or secondary enterprise with the purpose of profiting from the transportation performed. In our opinion, they cannot be both. A finding that a company is engaged in performing transportation for compensation with a purpose of profiting therefrom is inconsistent with and precludes a finding that the motor operations are conducted in bona fide furtherance of its other and primary commercial enterprise.

In many cases the critical issue to be resolved, in applying the "primary business" test, is whether the operator of the vehicles has any non-transportation

enterprise whatever; either his only operation is the transaction being evaluated, or his other services are concededly for-hire transportation.[9] In other cases, the operator clearly has a primary industrial or mercantile enterprise and the question is whether specific transportation operations "are within the scope, and in furtherance of" such primary business.[10]

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[9] *E.g.*, *Scott* v. *Interstate Commerce Commission*, 213 F. 2d 300 (C.A. 10, 1954); *A. W. Stickle & Co.* v. *Interstate Commerce Commission*, 128 F. 2d 155, 159 (C.A. 10, 1942), certiorari denied, 317 U.S. 650 (1942); *Interstate Commerce Commission* v. *Asphalt Supply Co.*, 152 F. Supp. 559, 561 (N.D. Tex., 1957); *Mumby Investigation of Operations*, 82 M.C.C. 237, 249 (1960); *Subler Transfer, Inc.-Investigation of Permits*, 79 M.C.C. 561 (1959); See also cases in fn 12, p. 15, *infra*.

The Commission position that there was no non-transportation business was rejected in *Taylor* v. *Interstate Commerce Commission*, 209 F. 2d 353 (C.A. 9, 1953), certiorari denied, 347 U.S. 952 (1954); *Interstate Commerce Commission* v. *Woodall Food Prod. Co.*, 207 F. 2d 517 (C.A. 5, 1953); *Interstate Commerce Commission* v. *Clayton*, 127 F. 2d 967 (C.A. 10, 1942).

[10] *E.g.*, *Interstate Commerce Commission* v. *Jamestown Sterling Corp.*, 64 F. Supp. 121 (W.D.N.Y., 1945); *Wallace-Investigation of Operations*, 89 M.C.C. 593 (1962); *Burlington Mills Corp., Transp. for Compensation*, 53 M.C.C. 327 (1951); *Watson Mfg. Co., Inc., Common Carrier Application*, 51 M.C.C. 223 (1949); *Woitishek Common Carrier Application*, 42 M.C.C. 193 (1943); see backhaul cases discussed *infra*, pp. 25–29. The leading *Woitishek* decision stressed that a person primarily engaged in manufacturing, merchandising or some other noncarrier enterprise may still be held to be "a carrier for hire" as to a particular transportation activity "which he performs * * * not primarily in furtherance of his noncarrier interest but rather * * * with a purpose to profit from the transportation as such." 42 M.C.C. at 206.

The Commission position that certain operations were not incidental to an existing non-transportation business was rejected in *Interstate Commerce Commission* v. *Tank Car Oil Corp.*, 151 F. 2d 834 (C.A. 5, 1945).

Notwithstanding this Court's affirmation of the "primary business" test in *Brooks Transportation*, subsequent decisions by lower courts raised doubts whether a truck operator could be found to be a for-hire carrier operating without Commission authorization in the absence of some affirmative showing that his operations brought him within the definitions of common or contract carriage.[11] The Commission accordingly sought legislation to deal with the increasing use of buy-sell arrangements. In doing so, it explicitly brought to the attention of Congress the special class of buy-sell operations involving the use of backhaul capacity, previously noted in the early *McBroom* case and other decisions,[12] and involved in the instant case. In this situation, an oper-

[11] In *Taylor* v. *Interstate Commerce Commission*, 209 F. 2d 353 (C.A. 9, 1953), certiorari denied, 347 U.S. 952 (1954) and *Interstate Commerce Commission* v. *Woodall Food Prod. Co.*, 207 F. 2d 517 (C.A. 5, 1953), the courts rejected the Commission's position that the operators were not in lawful private carriage, largely on the grounds that there was no express or implied contract for transportation services (*Taylor*), and no holding out as a carrier for hire (*Woodall*). These decisions, although not expressly rejecting the primary business test, in effect, undermined it. *Taylor* was specifically discussed in the Commission's Sixty-Eighth Annual Report (1954), p. 82.

[12] *McBroom Contract Carrier Application*, 1 M.C.C. at 427, described *supra*, p. 12; *Triangle Motor Co. Contract Carrier Application*, 2 M.C.C. 485, 489 (1937); *Farnsworth Contract Carrier Application*, 4 M.C.C. 164, 165–166 (1938); *Redding Common Carrier Application*, 7 M.C.C. 608, 610–611 (1938); *Siler Common Carrier Application*, 9 M.C.C. 719, 720 (1938); *Edward Pearsall Co. Contract Carrier Application*, 11 M.C.C. 646, 647 (1938). In these cases, the operator's lawful movement was in common or contract carriage, to which was sought to be appended a backhaul of commodities purchased for resale.

ator who has undertaken an authorized one-way truck movement—either in for-hire or private carriage—hauls, on the reciprocal or return leg of the movement, goods which he has bought for his own account and which he resells, usually for immediate delivery on arrival. This "buy-sell" transaction is stimulated by the presence of available backhaul capacity and the desire to spread the costs of the round trip necessitated by the outbound movement. If, instead of returning empty, the operator can backhaul goods and recoup more than their purchase price, he can apply the excess to help defray the transportation costs of, or add to the profit from, a movement already undertaken for other business reasons."[12]

Beginning in its annual report for 1953, and each year thereafter until the enactment and amendment of Section 203(c), the Commission described the increasing resort to buy-sell operations and the resulting adverse effects upon regulated carriage. It particularly stressed the practice whereby manufacturing and commercial firms using private carriage purchase goods for transportation on the backhaul and resell them. "Such transportation" the Commission advised Congress "is performed for the purpose of receiving compensation for the otherwise empty return of their trucks". Sixty-Seventh Annual Report (1953), p. 55; see also Sixty-Eighth Annual Report (1954), p. 5; Sixty-Ninth Annual Report (1955), p. 99; Seventieth Annual Report (1956), p. 161; Seventy-First Annual

[12] See *Church Point Wholesale Beverage Co.* v. *United States*, 200 F. Supp. 508 (W. D. La., 1961); Taff, *Commercial Motor Transportation* (3d ed. 1961), pp. 221-222.

Report (1957), p. 137.[14] In the last two cited reports, the Commission recommended the passage of legislation [15] and the result was the amended Section 203(c) applied by the Commission in this case.

[14] Thus, in its Sixty-Seventh Annual Report (1953), the Commission said (p. 55):

> Merchandising by motortruck, whether actual or pretended, over long distances is increasing to such an extent that it is becoming a major factor in the transportation of freight between distant points. Manufacturers and mercantile establishments, which deliver in their own trucks articles which they manufacture or sell, are increasingly purchasing merchandise at or near their point of delivery and transporting such articles to their own terminal for sale to others. Such transportation is performed for the purpose of receiving compensation for the otherwise empty return of their trucks. Sometimes the purchase and sale is a bona fide merchandising venture. In other cases, arrangements are made with the consignee of such merchandise for the "buy-and-sell" arrangement in order that the consignee may receive transportation at a reduced cost.

[15] Hearings on S. 1384, etc., Before a Subcommittee of the Senate Committee on Interstate and Foreign Commerce, 85th Cong., 1st Sess., pp. 25–26 (1957); Hearings on Problems of the Railroads before the Subcommittee on Surface Transportation of the Senate Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess., p. 1832 (1958); Hearings on Railroad Problems before a Subcommittee of the House Committee on Interstate and Foreign Commerce, 85th Cong., 2d Sess., p. 109 (1958).

The original legislative proposal of the Commission was to amend the definition of "private carrier" in Section 203(a)(17), see S. 1677, H.R. 5825, 85th Cong., 1st Sess. In the Seventy-First Annual Report (1957), p. 138, the Commission stated that its "objective" would be "accomplished just as readily" by a proposal of the Transportation Association of America, which would write the primary business test into the Act. The congressional committee reports show that, by doing so in Section 203(c), Congress was accepting the Commission's approach towards buy-sell arrangements and backhaul operations.

The first step was the enactment of original Section 203(c) which, as added to the Act in 1957, expressly prohibited engaging in "for hire transportation" without Commission authorization.[16] The committee report on this provision stated that such a prohibition was necessary to prevent the creation of a "no man's land" between regulated and private carriage, in which unregulated "for hire" operations might be conducted on the theory that they did not constitute common carriage, "because not held out to the general public, or for other reasons" and did not meet the definition of contract carriage. H. Rep. 970, 85th Cong., 1st Sess., p. 4; see also S. Rep. 703, 85th Cong., 1st Sess., pp. 6, 7–8; Interstate Commerce Commission, Seventieth Annual Report (1956), pp. 161–162.

The following year, at the Commission's urging, Congress took the next step and dealt explicitly with the line between "for hire" and private transportation. In the Transportation Act of 1958, 72 Stat. 574, the new Section 203(c) was amended to add the following prohibition:

> nor shall any person engaged in any other business enterprise transport property by motor vehicle in interstate or foreign commerce for

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[16] Section 203(c), as amended by Section 2 of Public Law 85–163, 71 Stat. 411, provided as follows:

> Except as provided in section 202(c), section 203(b), in the exception in section 203(a)(14), and in the second proviso in section 206(a)(1), no person shall engage in any for-hire transportation business by motor vehicle, in interstate or foreign commerce, on any public highway or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such person a certificate or a permit issued by the Commission authorizing such transportation. * * *

> business purposes unless such transportation is within the scope, and in furtherance, of a primary business enterprise (other than transportation) of such person.

Congress thereby sought to eliminate the specific practices brought to its attention by the Commission, which it regarded as "pseudo-private carriage," characterized by "subterfuges" to evade economic regulation and avoid imposition of the transportation excise taxes. S. Rep. No. 1647, 85th Cong., 2d Sess., pp. 5, 23; H. Rep. No. 1922, 85th Cong., 2d Sess., pp. 17–18. The Senate Committee (at p. 24), after noting its concern over the erosion of traffic of regulated carriers, explained that one common technique was the "so-called buy-and-sell method," in which papers are prepared "to make it appear" that the commodities belong to the owner of the vehicle; and that another increasingly used subterfuge was "the backhaul method of operation" involved in this case. By this means—

> * * * concerns that deliver in their own trucks articles which they manufacture or sell * * * then purchase merchandise at or near their point of delivery for transportation back to a point near their own terminal for sale to others, or * * * they transport property they do not own, such transportation being performed only for the purpose of receiving compensation for the otherwise empty return of their trucks.[17]

[17] Similarly, the House report (H. Rep. 1922, 85th Cong., 2d Sess., pp. 17–18) identified two types of "pseudo-private carriage" which it sought to prohibit as being "a subterfuge for engaging in public transportation without complying with

As the Senate Committee explained, both of these methods of commercial transportation—backhaul buy-sell operations auxiliary to lawful private carriage as well as spurious buy-sell arrangements—should be subject to economic regulation (S. Rep. No. 1647 at pp. 24–25):

> With the Interstate Commerce Act amended in this way commercial highway transportation of property in interstate or foreign commerce would, with certain specific exemptions, be required to fall into one or another of three classes: (a) duly certificated common carriage, (b) duly permitted contract carriage or (c) transportation solely within the scope and in furtherance of a primary business enterprise (other than transportation) of the transporter. Other commercial highway transportation, except as specifically provided, would be prohibited. This, it is believed, would serve to correct most of the abuses that have arisen in the name of private carriage and yet would not in any

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the certificate or permit requirements of the Interstate Commerce Act." The first was the fictitious buy-sell arrangement. The second was the backhaul buy-sell here involved, described as follows (*id.* at 18):

> In addition, businesses which use their own trucks to deliver their own merchandise, are purchasing goods at or near the final point of delivery of their own merchandise, and transporting such goods to places near their own establishments for sale to others. Such transportation is usually performed solely for the purpose of receiving compensation for the otherwise empty return of their trucks. Sometimes the purchase and sale is a bona fide merchandising venture. In other instances, prearranged plans are set up in order that the real consignee may receive transportation at a reduced cost.

See also 104 Cong. Rec. 10818; 104 Cong. Rec. 12535.

way jeopardize or interfere with what might be called legitimate or bona fide private carriage. Indeed the "primary business test" contained in *Brooks Transportation Co.* v *U.S.* (340 U.S. 925 (1951)), so sacrosanct to the private carriers and deemed by them essential to their best interests and the preservation of their rights, would be written directly into the statute.

Thus, the express purpose of this legislation was twofold: *first,* to confirm the Commission's "primary business" test, making clear that transportation operations cannot qualify as exempt private carriage unless they are performed by someone primarily engaged in a non-transportation business and are within the scope and in furtherance of that primary business; *second,* and more directly in point here, to make plain that the purchase and sale of goods solely to take advantage of available backhaul capacity cannot qualify as a "primary business enterprise (other than transportation)" and that the transportation of such goods is not lawful private carriage.

Read against this background, we believe that there is no ambiguity in the statute and no doubt of its applicability to this case. But even if the sense of the law were less clear, plainly this is the kind of case which "belongs to the usual administrative routine" of the agency (*Gray* v. *Powell,* 314 U.S. 402, 411) and the Commission's application of the statutory test to the specific facts of this case "is to be accepted if it has 'warrant in the record' and a reasonable basis in law." *Labor Board* v. *Hearst Publications,* 322 U.S. 111, 131.

B. THE COMMISSION PROPERLY HELD THAT APPELLEE'S TRANSPORTATION OF SUGAR, PERFORMED AS PART OF SUCH A BUY-SELL OPERATION BASED UPON AN AVAILABLE BACKHAUL, WAS "FOR HIRE" TRANSPORTATION UNDER SECTION 203 (C)

In appraising the lawfulness of asserted private carriage under Section 203(c), the Commission has consistently sought to apply the criteria of the Act in effectuation of the congressional purpose which we have described. In this and other cases, the dispositive question has been whether the buy-sell operations were dictated by the availability of backhaul movements of the carrier's trucks. The Commission's finding here that this was the basis of appellee's sugar business is supported by compelling evidence. Its conclusion that appellee was not engaged in lawful private carriage of sugar represents a consistent and correct administrative interpretation of the governing statute.[18]

1. As the Commission stated, appellees have admitted that "their principal reason for purchasing sugar at Supreme is to provide a backhaul * * * and that in order to make a profit on the backhaul of sugar they would have to have something moving to Louisiana from San Antonio" (R. 29). Mr. Richard J. Shannon testified that the appellees normally purchased sugar only to make a return load for their vehicles to San Antonio, after having made deliveries

[18] The enactment of Section 203(c) and its amendment in 1958 occurred between the time that the examiner submitted his report and recommended order on August 29, 1957, and the time the Commission, Division 1, served its report on August 11, 1959. The Commission was obligated to consider the matter under the provisions of the Act as amended. *Ziffrin, Inc.* v. *United States*, 318 U.S. 73, 78.

of outbound shipments of livestock or other merchandise at or near Supreme (R. 112–113, 132); and that they could not profitably deal in sugar at the prevailing market price at San Antonio but for the availability of the vehicles which they otherwise would have to return without lading (R. 112). The Commission had ample ground to conclude that "the purpose of [appellees'] sugar dealings is the generation of sugar shipments which they can transport as return lading for their trucks which are moving in the opposite direction"; and that this purchase-and-sale and transportation was undertaken "to reduce the cost of transporting other commodities outbound from San Antonio" (R. 29).

The result, that appellees' sugar dealings was not a primary nontransportation business under Section 203(b), is strongly buttressed by other facts noted by the Commission. Appellees ordinarily sell the sugar while it is en route or upon arrival (R. 24, 29, 68, 117–118) and deliver the sugar by routing the trucks from the refinery directly to the customer at San Antonio (R. 23, 68; Ex. 1, R. 117–118).[19] Moreover, unlike their operations in livestock, feed and related items, appellees never use common or contract carriage in their sugar dealings; the only sugar which

[19] Appellees contend that sugar must be disposed of rapidly because of its perishable nature (Motion to Affirm, p. 4). It is clear, however, that sugar can be warehoused for substantial periods if proper equipment is installed to control temperature and humidity. Spencer & Meade, *Cane Sugar Handbook* (8th ed. 1945), pp. 242–244. The absence of such equipment is further evidence that appellees' sugar dealings were not a bona fide primary business.

they bought and sold was transported in their own vehicles (R. 23, 115). Thus, while they claim to be in a general mercantile business, appellees themselves clearly distinguish their sugar operations from their principal trade in livestock, feed and related items.[20] In sum, their dealings in sugar are determined and limited by the times and place at which their empty trucks are available for a backhaul.

2. The facts of this case, in short, fit Congress' description of the operations it meant to exclude from exempt status by the 1958 amendment to Section 203(c). Appellees, "deliver in their own trucks articles which they manufacture or sell and then purchase merchandise at or near their point of delivery for transportation back to a point near their own terminal for sale to others". S. Rep. 1647, 85th Cong., 2d Sess., p. 24. (1958). Such transportation was "performed only for the purpose of receiving compensation for the otherwise empty return of their trucks" (*ibid.*).

Moreover, the Commission's decision here is consistent with the uniform application of Section 203(c) to backhaul buy-sell operations. No sound distinction can be drawn between the instant decision and a

[20] In their Motion to Affirm, p. 3, appellees characterize their business as extending to "everything in the feed line." The record indicates that their principal *sugar* customers include a wholesale grocer, a candy company, a bottler and a dairy (R. 66–67, 70, 83; Ex. 1, R. 118). While the Commission did not have occasion to rely upon this fact, it seems clear that appellees' sugar customers are quite distinct from the remainder of their trade. This confirms that the sugar sales were not a natural extension of appellees' primary business, but were dictated by their backhaul capacity.

line of recent Commission cases under 203(c) following *Shannon*, two of which have been approved by three-judge district courts.[21]

In each of these cases, the companies were admittedly engaged in a primary non-transportation enterprise, in connection with which they performed lawful private carriage. On the disputed backhaul, each company carried goods which it bought at or near the terminus of the lawful private haul, and which it resold at or near the point of origin to which the vehicles returned.[22] The common pattern also in-

[21] *Church Point Wholesale Beverage Co.—Investigation of Operations*, 82 M.C.C. 456 (1960), affirmed, *Church Point Wholesale Beverage Co.* v. *United States*, 200 F. Supp. 508 (W.D. La., 1961); *Wilson—Investigation of Operations*, 82 M.C.C. 651 (1960); *Hofer—Investigation of Operations*, 84 M.C.C. 527 (1961); *Cahaba Steel Co.—Investigation of Operations*, 86 M.C.C. 759 (1961), affirmed *Cahaba Steel Co.* v. *United States*, S.D. Ala., Civil Action No. 2669, decided January 17, 1962 (unreported); *Meinerz Creamery Co.—Investigation of Operations*, 88 M.C.C. 77 (1961); *Stewart—Investigation of Operations*, 89 M.C.C. 281 (1962).

[22] In *Stewart* and *Church Point*, the lawful private carriage was inbound, consisting of the transportation of goods to the respective business establishments. The disputed reciprocal movement was actually a "fronthaul"; the companies transported goods purchased near their places of business for resale near the places to which empty trucks would otherwise have gone to pick up merchandise. For purposes of Section 203(c), this is the same as a backhaul and we will not distinguish between them. In *Hofer*, the Commission expressed doubt that the operator had any lawful primary business, but then discussed the backhaul on the *arguendo* assumption that the outbound movement was lawful.

Unlike the cases in the text, in which the backhaul was reciprocal to a lawful private movement, one recent case involved a disputed backhaul when the outbound movement was in lawful

cluded deliveries to customers directly on the trucks which executed the backhaul;[23] the consistent failure to use common or contract carriage to carry the goods whose transportation was in question;[24] and a profit dependent on the use of backhaul capacity.[25] Also revealing is the fact that in all but one of the above cases, the backhauled commodity was sugar bought at an accessible refinery; in *Cahaba*, it was salt. Such fungible commodities as sugar lend themselves to this method of operation, since they are easily disposed of by the truck operator.[26]

In each of the cited cases, as here, the Commission ruled that the operations were not lawful private carriage. The relationship of the disputed carriage

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for-hire carriage, like the early cases cited *supra*, p. 15, fn. 12. *Subler Transfer, Inc.—Investigation of Permits*, 79 M.C.C. 561 (1959).

[23] See, *e.g.*, *Stewart*, 89 M.C.C. at 286; *Meinerz*, 88 M.C.C. at 79–80, 85; *Hofer*, 84 M.C.C. at 537–539; *Wilson*, 82 M.C.C. at 656; *Church Point Wholesale Beverage Co.*, 82 M.C.C. at 459–460.

[24] See, *e.g.*, *Stewart*, 89 M.C.C. at 288; *Meinerz*, 88 M.C.C. at 84; compare *Lenoir Chair Co. Contract Carrier Application*, 51 M.C.C. at 66, 67; *Woitishek Common Carrier Application*, 42 M.C.C. at 206.

[25] See, *e.g.*, *Stewart*, 89 M.C.C. at 288; *Meinerz*, 88 M.C.C. at 84; *Cahaba Steel Co.*, 86 M.C.C. at 765; *Hofer*, 84 M.C.C. at 540.

[26] In a case involving buy-sell arrangements on the direct haul of sugar and flour (not a backhaul), the Commission found that the operations were not lawful private carriage under Section 203(c) and noted the "increasing number of cases of this type coming before us, and the frequency with which the commodity involved in such cases is sugar or another fungible such as flour". *Mumby Investigation of Operations*, 82 M.C.C. 237, 249 (1960).

to available backhaul capacity was critical to these determinations. Thus, as stated in *Stewart*, 89 M.C.C. at 288, the backhauling "coordination of movements inevitably leads to the conclusion that the considered sugar operations are performed solely for the purpose of achieving a profit-yielding two-way movement, and eliminating the cost of dispatching an empty vehicle to a supplier to pick up other merchandise for use in bona fide wholesale and retail operations." The point was also developed in *Meinerz*, 88 M.C.C. at 84, which explained that the company "does not transport sugar from the refineries except as a backhaul, and by the fact that it would not be in the sugar business at all except for the fact that it can backhaul this commodity. * * * its *transportation* of dairy products by reducing the cost thereof and thus falls within the prohibition of section 203(c) of the act."

As noted, in two of these cases closely resembling this one, three-judge district courts have affirmed the Commission's judgment. In *Church Point Wholesale Beverage Co.* v. *United States*, 200 F. Supp. 508 (W.D. La., 1961), the court relied upon the "clear" language of Section 203(c), and its "unmistakable" purpose, to hold that the backhaul of sugar did not meet the primary business test (200 F. Supp. at 516–517):

> The only relationship between the movement of sugar and plaintiffs' primary business of wholesaling is that the sums realized from the movement of the sugar serve to reduce the cost of conducting plaintiffs' other transportation activities. * * *

> While the northbound transportation of sugar reduces the allocation of round-trip costs assignable to the merchandise picked up for wholesale distribution in Louisiana, this economic benefit accruing to the non-carrier business enterprise of the plaintiffs is too remote to place such transportation within the regulatory exemption afforded private carriage by the Act. But for the mechanics of assuming title to the sugar they transport, there would be no question that the plaintiffs are engaged in for-hire carriage in their northbound transportation.

And the court pointed to the impact of a contrary result (*ibid.*):

> Plaintiff's justification of their northbound transportation would make a nullity of the primary business test expounded by the Commission, sustained by the courts and ratified by the Congress in the enactment of Section 203(c) of the Act, for it would permit any person engaged in any other business enterprise to transport property by motor vehicle, irrespective of whether such transportation is, in fact, within the scope or in furtherance of such person's primary business enterprise, if the performance of the transportation makes possible more profitable utilization of the equipment used in the primary business enterprise.

In *Cahaba Steel Co.* v. *United States*, S.D. Ala., Civil Action No. 2669, decided January 17, 1962, the court, in a brief *per curiam* order, affirmed the Commission's ruling (*Cahaba Steel Co.—Investigation of Operations*, 86 M.C.C. 759, 764–765) that a steel wholesaler was engaged in for-hire transporta-

tion by conducting a backhaul operation in salt "to avoid an empty return haul" after delivery of his goods in trucks; the conclusion was that the evidence "show[ed] an intention to profit from the return transportation as such" and that the company was "engaging in for-hire transportation subject to the certificate or permit requirements of the Act."

This consistent interpretation of the Act, in harmony with the legislative purpose, strongly supports the result reached by the Commission in this case. We submit that the Commission correctly applied Section 203(c) in the premises. Since appellees were engaged in unauthorized for-hire transportation of sugar, the Commission's cease-and-desist order should have been sustained.[27]

[27] Appellees have contended (Motion to Affirm, pp. 20–22), that the Commission's order was erroneous because it stated that the sugar transportation was "in violation of section 206(a) or 209(a) of the Interstate Commerce Act" (R. 30), without identifying which was violated. These sections authorize issuance of certificates to common and contract carriers respectively. It was sufficient for the Commission to note that appellees lacked any authorization under either section, after deciding that they were beyond the scope of private carriage, and it was not necessary for the Commission to decide whether appellees could be classed as common or contract carriers. In many cases, the courts have enjoined unauthorized for-hire motor carrier operations without finding whether the defendant would otherwise be a common or contract carrier. *Vincze* v. *Interstate Commerce Commission*, 267 F. 2d 577 (C.A. 9, 1959); *Lamb* v. *Interstate Commerce Commission*, 259 F. 2d 358 (C.A. 10, 1958); *Georgia Truck System* v. *Interstate Commerce Commission*, 123 F. 2d 210, 212 (C.A. 5, 1941); *Interstate Commerce Commission* v. *Isner*, 92 F. Supp. 582 (E.D. Mich., 1950); *Interstate Commerce Commission* v. *F & F Truck Leasing Co.*, 78 F. Supp. 13 (D. Minn., 1948).

C. THE DISTRICT COURT ERRED BY FAILING TO APPLY THE STANDARDS OF SECTION 203(C)

The notable feature of the decision of the district court is that it reversed the Commission, and held that appellees were engaged in lawful private carriage, without once citing the governing statute, Section 203(c). As a result, the court below failed to evaluate, or even note, those facts in the record which are critical to application of the Act's primary business test in a backhaul situation. The standard implicitly adopted is plainly incorrect.

1. As we have explained, application of the statutory test to this situation requires a determination whether the appellees' transportation of sugar was a buy-sell operation tied to backhaul movements of its trucks. The court below purported to set out the "relatively uncomplicated" "basic facts in this proceeding" (R. 166). But it nowhere mentions that appellees normally bought and transported sugar for resale only to fill otherwise empty trucks on a backhaul; that they could not have dealt profitably in sugar without the available backhaul; that they usually delivered sugar directly to San Antonio customers; and that they never used for-hire transportation in their sugar operations. These facts were crucial to the Commission's determination under the "primary business" criterion.

The issue here cannot be answered by resort to legal rules developed for other purposes (like fixing the risk of loss), any more than by calling upon a layman's understanding of what is private carriage or what is a non-transportation enterprise. Congress

determined that transportation operations as part of backhaul buy-sell dealings—although private in the sense that the trucker owned the goods—should be excluded from the statutory concept of lawful private carriage. To achieve this, Congress adopted as its test whether the carriage is "within the scope, and in furtherance, of a primary business enterprise (other than transportation)".

The theory of the statute is that trading tied to a backhaul serves to reduce the cost of the lawful one-way haul already undertaken and is, in effect, a by-product of transportation facilities, not a part of the primary business activities of the enterprise. It is the statutory standard, construed in the light of this congressional purpose, which is controlling.

2. The court's statement of what it deemed the pertinent facts shows that it ignored this standard. The court pointed out that only a relatively small portion of appellees' assets and weekly payroll were devoted to their transportation operations (R. 166). This would be pertinent to a determination whether the appellees were engaged in any primary business other than transportation. But it is undisputed that appellees' trading in livestock, feed and related items did constitute a primary non-transportation business. The question is whether appellees' buying and selling of sugar was also such a primary enterprise. This question must be answered in the light of the intent of Congress expressed in Section 203(c) to prevent the use of the "backhaul method of operation" as a means of escaping "economic regulation" (S. Rep. No. 1647, 85th Cong., 2d

Sess., pp. 23–24; H. Rep. No. 1922, 85th Cong., 2d Sess., pp. 17–18). In that light, buy-sell dealings dictated by the availability of backhaul capacity cannot qualify as a primary non-transportation business.

Nor is the decision below supported by the other facts recited in the opinion (R. 166–167): that appellees' purchases of sugar were normally not against pre-existing orders; that they took title to the sugar and assumed the risks of loss or damage, or of price fluctuations incident thereto; that they sold the sugar on credit and had sizeable accounts receivable for sugar sales; that they assessed no identifiable transportation charge, and that they did not hold themselves out to haul sugar for compensation. These circumstances might have been pertinent if the *bona fides* of appellees' acquisition and disposition of the sugar were in issue. To be sure, in 1958 Congress sought to exclude from the class of lawful private carriage spurious buy-sell arrangements.[23] But it also made clear that "the backhaul method of operation" would not qualify for exemption.

In the case of "backhaul" transportation the ultimate question is whether the buy-sell operation is conducted because of and measured by the availability of backhaul capacity. Here, therefore, such facts as were noted by the district court are of distinctly subsidiary significance. That line of inquiry is of special relevance where the issue is whether the purchase and sale are a sham. But the bona fides of the commercial

[23] See *Woitishek Common Carrier Application*, 42 M.C.C. 193, 201–207 (1943); *Wilson—Investigation of Operations*, 82 M.C.C. 651, 655 (1960).

transaction cannot outweigh the congressional policy that buy-sell operations conducted because of the availability of a backhaul is not lawful private carriage.

Finally, the Commission's conclusion is unimpaired by the court's finding that appellee's business in livestock, feed and related items was "a general mercantile business." Apart from the absence of any record support for this characterization of appellees' trading in livestock, feed and related items, it is clear that the sugar dealings were discrete from the rest of their business. They were developed to generate a backhaul and were only carried out in appellees' trucks, to mention two salient distinctions. See also *supra*, pp. 22–24. The lower court's approach would permit any mercantile firm selling a reasonable range of goods to backhaul any other commodity without Commission authority. This would go a long way to "make a nullity of the primary business test," *Church Point Wholesale Beverage Co.* v. *United States*, 200 F. Supp. at 517. Effectuation of the legislative purpose required a separate appraisal of the backhauled commodity and its relation, if any, to a primary non-transportation business.[20] It was only by failing to follow that approach that the court was able to conclude that appellees were "in the sugar business." More careful analysis, we submit, would have shown that they entered the sugar *transportation* business.

[20] See the discussion of the operators' wholesale and retail mercantile business in *Stewart*, 89 M.C.C. at 287–288; *Church Point Wholesale Beverage Co.*, 82 M.C.C. at 460–461.

CONCLUSION

The judgment of the district court should be reversed.

Respectfully submitted.

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APPENDIX

Section 203(a)(14) of the Interstate Commerce Act, 49 U.S.C. § 303(a)(14), provides:

> The term "common carrier by motor vehicle" means any person which holds itself out to the general public to engage in the transportation by motor vehicle in interstate or foreign commerce of passengers or property or any class or classes thereof for compensation, whether over regular or irregular routes, except transportation by motor vehicle by an express company to the extent that such transportation has heretofore been subject to part I, to which extent such transportation shall continue to be considered to be and shall be regulated as transportation subject to part I.

Section 203(a)(15) of the Interstate Commerce Act, 49 U.S.C. § 303(a)(15), provides:

> The term "contract carrier by motor vehicle" means any person which engages in transportation by motor vehicle of passengers or property in interstate or foreign commerce, for compensation (other than transportation referred to in paragraph (14) and the exception therein), under continuing contracts with one person or a limited number of persons either (a) for the furnishing of transportation services through the assignment of motor vehicles for a continuing period of time to the exclusive use of each person served or (b) for the furnishing of transportation services designed to meet the distinct need of each individual customer.

Section 203(a)(17) of the Interstate Commerce Act, 49 U.S.C. § 303(a)(17), provides:

> The term "private carrier of property by motor vehicle" means any person not included in the terms "common carrier by motor vehicle" or "contract carrier by motor vehicle", who or which transports in interstate or foreign commerce by motor vehicle property of which such person is the owner, lessee, or bailee, when such transportation is for the purpose of sale, lease, rent, or bailment, or in furtherance of any commercial enterprise.

Section 203(c) of the Interstate Commerce Act, 49 U.S.C. § 303(c), provides:

> Sec. 203(c) * * * no person shall engage in any for-hire transportation business by motor vehicle, in interstate or foreign commerce, on any public highway or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such person a certificate or a permit issued by the Commission authorizing such transportation,* nor shall any person, engaged in any other business enterprise transport property by motor vehicle in interstate or foreign commerce for business purposes unless such transportation is within the scope, and in furtherance, of a primary business enterprise (other than transportation) of such person.

Section 206(a) of the Interstate Commerce Act, 49 U.S.C. § 306(a), in part provides:

> * * * no common carrier by motor vehicle subject to the provisions of this part shall engage in any interstate or foreign operation on

*Section 203(c) as added to the Act in 1957 ended at the point indicated by the above asterisk, 71 Stat. 411. The remainder of the section was added by amendment in 1958, 72 Stat. 574.

> any public highway, or within any reservation under the exclusive jurisdiction of the United States, unless there is in force with respect to such carrier a certificate of public convenience and necessity issued by the Commission authorizing such operations: * * *.

Section 209(a) of the Interstate Commerce Act, 49 U.S.C. § 309(a), provides in part:

> * * * no person shall engage in the business of a contract carrier by motor vehicle in interstate or foreign commerce on any public highway or within any reservation under the exclusive jurisdiction of the United States unless there is in force with respect to such carrier a permit issued by the Commission authorizing such person to engage in such business * * *.

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